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SUPREME COURT U. S.

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 48.

WILLIAM H. ANDREWS, *Plaintiff in Error,*

vs.

EASTERN OREGON LAND COMPANY.

In Error to the Supreme Court of the State of Oregon.

PETITION FOR REHEARING.

STOCKSLAGER & HEARD,
Attorneys for Plaintiff in Error.

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The said William H. Andrews, plaintiff in error, comes now and respectfully petitions this honorable court for a rehearing of said cause for the following reasons, to wit:

1. Because as set out in the opinion of this court, the certificate of the clerk of the trial court by specifically enumerating all of the papers in the record sent to the Supreme Court, excludes the presumption that any other paper or papers were sent. Neither in this certificate, nor in any recital in the decision of the Supreme Court, is it shown that there was any bill of exceptions in the record.

The Supreme Court of Oregon has held that under the practice in that State, in the absence of a bill of exceptions,

the only question the Supreme Court can inquire into is whether the findings support the judgment. Hirkins vs. McClear, 18th Oregon, 138; Noland vs. Bull, 24th Oregon, 479, and Richardson vs. Dunlap, 26th Oregon, 270.

Attention is respectfully invited to the apparent conflict in the statement of facts, and the decision of this court on the question of the taking and preserving of the evidence. It is first stated that "no testimony is preserved, although it appears that the case was referred to a referee who took and reported the testimony." In the decision of the case it is stated that "it is the highest court in the State, and we may not ignore its recital of what it considered, especially as it appears that testimony was taken and preserved." In the absence of any recital in the decision of the Supreme Court that the evidence was before the court in the method pointed out by the statute, and in the face of the certificate of the clerk of the trial court, which, by exclusion, shows no evidence was transmitted to that court as a part of the record, is it the duty of this court to regard findings of fact made by that court? The court does not recite that the evidence is before it, either by bill of exceptions or otherwise.

2. Because this court, although holding that the certificate of the trial court, and the certificate of the clerk of the Supreme Court of Oregon, both failed to show there was anything before the Supreme Court upon which it could make a finding of facts, yet held, that as it was the highest court of the State, its recital of what it considered especially as it appeared that the testimony was taken and preserved, could not be ignored; and that as the decision was in harmony with the general rule as to the effect to be given to a patent of the United States, "the judgment should not be set aside upon any presumption of what might have been the testimony upon which the trial court made its findings," notwithstanding the fact that the only evidence in the record

as to the testimony before the trial court, consists in the recitals of the Supreme Court referred to.

3. Because an analysis of the decision of the Supreme Court shows clearly that it was based, not upon any evidence which was before it, or before the trial court, but on the contrary, it was made to turn upon the presumption of the Supreme Court that there was other and better evidence which was not produced, and hence that the evidence was not sufficient to overcome the *prima facie* title of the company. This is fully shown by the following quotations from the opinion: (a) After reciting the evidence of title introduced by the plaintiff below defendant in error, the court recites what was introduced to overcome the case thus made, and particularly the certified copy of the plat or map from the office of the Secretary of State, the plat upon which the measurements were made, said:

> "Neither the act of Congress nor the Legislative Assembly of the State required that any such map or plat should be filed in the office of the Governor of the Secretary of State, nor does it appear that the plat so filed was the one approved by the Secretary of the Interior, representing the final survey and definite location of the road, much less that the Secretary of the Interior made use of the plat or made his adjustment from it as the basis for determining the limits of the grant."

(b) After reciting the evidence introduced by plaintiff in error, the court said:

> "But with all this, giving full credence to the plat as indicating the final location of the road as constructed, and conceding that Mohr is correct in his premises, it does not appear to us that it is sufficient to impeach the official record of the Land Department of the General Government; that is to say, it is not the better evidence as to the regularity of the adjustment of the grant."

(c) We are not left in doubt as to what the court considered the "better evidence," for a few paragraphs further on, it is said:

> "There is undoubtedly a map of definite location of this road on file with the Land Department and approved by the department (see Wilcox vs. Eastern Oregon Land Company, 176 U. S., 51), which forms the real basis for the adjustment of the grant and constitutes the best evidence upon the subject, and, until that is produced and shown to be inaccurate, or the adjustment made from that as a basis is proven unwarranted, we can not presume to set aside and nullify the action of the Secretary of the Interior, and declare void a patent issued by the Government. The defendant must therefore fail upon his proofs, as not having overcome by competent evidence the *prima facie* title of the plaintiff exhibited by the records of the Land Department."

It is thus seen the court held that, assuming the measurement made by Mohr on the map introduced was made in accordance with the method followed in the Land Office, was accurate, and as found by the trial court, proved the land was outside of the limits of the grant, yet this was not sufficient to overcome the *prima facie* case made by the patent. Why was it not sufficient? The court answers the question clearly and unequivocally. It was because the court indulged the erroneous presumption that there was "better evidence." Neither are we left in doubt as to what it considered was the "better evidence." That is also clearly and positively stated, as above set out.

This leaves no doubt but that the court based its decision solely upon the ground that the map introduced was not competent evidence because not required by law to be filed in the office of the Secretary of State, or of the Governor, and that there was another and different map from the one introduced in the evidence, on file in the office of the Secretary of the Interior, from which the adjustment was made.

And that, until this map was produced and the adjustment made from it shown to be wrong, the court would not disturb the patent.

Now, when it is conceded as it was at the oral argument, that the map from which the adjustment was made was a duplicate of the one on file in the office of the Secretary of State, and that the method of measurement made by Mohr, was the same method as that used in the adjustment in the Land Office, it leaves absolutely nothing for the decision of the Supreme Court to stand upon. It is inconceivable that if the facts as to the map introduced and the method of adjustment followed in the Land Department, had been shown or admitted before that court, as it was at the oral argument in this court, the Supreme Court of Oregon would have reversed the decision of the trial court. The effect of that decision, we repeat, is that, admitting by the correct method of measurement made upon the map introduced, the land was clearly shown to be outside of the limits of the grant, as the law did not require the filing of the map in the office of the Secretary of State, and there must be another and different map on file in the office of the Secretary of the Interior from which the adjustment was made, it follows that not only the best evidence was not introduced, but that which was introduced was incompetent, therefore the plaintiff must fail.

But when it is admitted that the adjustment was made upon one and the same map, or a duplicate thereof, what is there left for the decision of the Supreme Court to stand upon?

It is in no sense based upon any finding made, unless it can be said that the admittedly erroneous finding, statement, conclusion, or mere presumption, that another and different map existed, which was the "better evidence" can be called a finding. The Supreme Court does not con-

trovert the finding of facts by the trial court, but introduced, was incompetent, for the reasons above stated.

And your petitioner prays, therefore, that an order be made for a rehearing of the argument in this case, on a day to be appointed by this court, at the present term, and upon such points as the court may direct.

WILLIAM H. ANDREWS,
by Stockslager & Heard, his Counsel.

I respectfully certify that I believe the grounds assigned for the foregoing petition for a rehearing are meritorious and well founded in law and fact.

S. M. STOCKSLAGER,
of Counsel.